1440-64

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1672.

HARRIS A. SMILER, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 28, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1672.

HARRIS A. SMILER, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AGENT AND WARDEN OF SING SING PRISON, NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Petition for writ of habeas corpus	1	1
Order denying writ	4	2
Appeal and allowance of same	5	2
Citation	7	3
Clerk's certificate	9	4

27176

1 *To the judges of the circuit court of the United States for the southern district of New York.*

The petitioner, Harris A. Smiler, by Ambrose H. Purdy, his attorney, respectfully shows unto your honors that he is unlawfully imprisoned and restrained of his liberty, contrary to law and in violation of the Constitution of the United States, by Augustus A. Brush, as agent and warden of the State prison at Sing Sing, in the southern district of New York.

II. The facts concerning the detention and the claim or authority by virtue of which he is so detained are as follows: He was convicted of the crime of murder in the first degree in the court of general sessions of the peace in and for the city and county of New York, on the 18th day of June, 1890, and sentenced upon such conviction to death under chapter 489 of the laws of 1888, and committed to the custody of said Brush accordingly.

III. That after the trial and conviction as aforesaid the counsel who appeared for the said Smiler abandoned the case, and thereafter one John R. Heinzelman was by the court of the general sessions of the peace, held in and for the city and county of New York, Justice James Fitzgerald presiding, the said court then and there having authority so to do, recognized the said John R. Heinzelman, appeared for the defendant, Smiler, and appealed from said judgment, conviction, and sentence of the

2 court of general sessions of the peace in said action to the court of appeals of this State and argued said appeal before said court, and had the exclusive care and management of the case from the date of conviction until the affirmance of the judgment by the court of appeals.

That the said *H*ohn R. Heinzelman was not an attorney or counsellor at law entitled to practice in the courts of this State, or any other State, and was therefore incompetent and incapable of managing such case and protecting the rights of said defendant, Smiler. That said Smiler was deprived of the right and privilege of counsel as guaranteed by the Constitution. Your petitioner says that the judgment and sentence in this case is void under the Constitution.

Your petitioner alleges that the commitment aforesaid and the detention under the conviction and sentence aforesaid and under said indictment are null and void, and of no force or validity, and prays that this honorable court do forthwith issue the writ of habeas corpus to the said Augustus A. Brush, agent and warden as aforesaid, requiring him to produce the body of Harris A. Smiler before this court, at some time to be designated in said writ, then and there to abide what shall be awarded by said court in the premises. And at the same time he prays your honors to issue out of said court the writ of certiorari to the said court of general sessions of the peace and the clerk thereof, commanding it or him forthwith to certify to said circuit court of the United States true copies of the indictment, judgment roll, orders, commitments, and war-

3 rants, and objections, motions, certificates, and proceedings in said court remaining under or by virtue of which said petitioner is now deprived of his liberty by authority of that court.

AMBROSE H. PURDY.

CITY AND COUNTY OF NEW YORK, *ss:*

Ambrose H. Purdy, being duly sworn, says he is authorized by Harris A. Smiler, the petitioner, to make, sign, and verify the foregoing petition; that he has read the same, and knows its contents, and that the same is true.

That the reason this petition is not verified by said Smiler is that he is in close and solitary confinement in said Sing Sing prison, and that the week fixed for his execution begins on Monday next, March 16th, and there is not time, therefore, to have him verify and serve the writ without endangering his life.

AMBROSE H. PURDY.

Sworn to before me this 12th day of March, 1891.

[SEAL.] B. W. TRAITEL,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court. In re petition, etc., of Harris A. Smiler. Ex parte Smiler. Petition. Ambrose H. Purdy, attorney for petitioner, 280 Broadway, N. Y. City. U. S. circuit court. Filed Mar. 12, 1891. John A. Shields, clerk.

4 At a stated term of the circuit court of the United States for the southern district of New York, held in the city of New York on the 12th day of March, 1891. Present, Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of Harris A. Smiler for a writ of habeas corpus.

The petition of Harris A. Smiler having been duly presented to this court for a writ of habeas corpus to inquire into the cause of his detention at Sing Sing prison, in the southern district of New York, by Augustus A. Brush, agent and warden of said prison, and for relief in the premises;

Now, on reading and filing said petition, and after hearing Ambrose H. Purdy, esq., counsel for said petitioner, it is

Ordered that the prayer of said petitioner be, and the same hereby is, in all things, denied.

E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court. In re petition, etc., of Harris A. Smiler. Ex parte Smiler. Order denying writ. Ambrose H. Purdy, attorney for petitioner, 280 Broadway, N. Y. City. U. S. circuit court. Filed Mar. 12, 1891. John A. Shields, clerk.

5 In the circuit court of the United States for the southern district of New York.

In the matter of the application of Harris A. Smiler for a writ of habeas corpus.

The petitioner, in behalf of Harris A. Smiler, conceiving himself aggrieved by the final decision of this court, declining to grant the writ of

habeas corpus herein, doth hereby appeal therefrom to the Supreme Court of the United States; and he prays that his appeal may be allowed and that a transcript of the record herein may be sent to the Supreme court.

Dated New York, March 12th, 1891.

AMBROSE H. PURDY.

The foregoing appeal is hereby allowed, and the clerk of this court is hereby directed to send to the Supreme Court of the United States forthwith a transcript of the petition, decision, order thereupon, and of this appeal.

Dated New York, March 12th, 1891.

E. HENRY LACOMBE.

Service of a copy of the within order is hereby admitted.

A. A. BRUSH,
Agent & Warden.

SING SING, *March 13th*, 1891.

6 (Endorsed:) U. S. circuit court. In re petition, etc., of Harris A. Smiler. Ex parte Smiler. Appeal and order allowing appeal. Ambrose H. Purdy, attorney for petitioner, 280 Broadway, N. Y. City. U. S. circuit court. Filed Mar. 14, 1891. John A. Shields, clerk.

7 By the Hon. E. Henry Lacomb, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to Augustus A. Brush, esq., agent and warden of Sing Sing prison in the State of New York, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden in the city of Washington, D. C., on the twenty-third of March, 1891, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Harris A. Smiler is appellant, and said Augustus A. Brush, as agent and warden, is appellee, to show cause, if any there be, why the decision in the said appeal mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, on the 12th day of March, 1891, and of the Independence of the United States 115th.

E. HENRY LACOMBE,
Circuit Judge.

AMBROSE H. PURDY,
Atty. for Petitioner.

8 (Endorsed:) U. S. circuit court. In re petition, etc., of Harris A. Smiler. Ex parte Smiler. Citation. Ambrose H. Purdy, esq., atty. for petitioner, 280 Broadway, New York City. Service of a copy of the within citation is hereby admitted. A. A. Brush, agent & warden. U. S. circuit court. Filed Mar. 14, 1891. John A. Shields, clerk.

9 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 9 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Harris A. Smiler, appellant, against Agustus A. Brush, as agent and warden, appellee, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this nineteenth day of March in the year of our Lord one thousand eight hundred and ninety-one and of the Independence of the said United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS,
Clerk.

(Indorsed on back:) No. 1672. Harris A. Smiler, appellant, vs. Augustus A. Brush, agent & warden of Sing Sing Prison, New York. S. New York—C. C. U. S. Filed March 23, 1891.

Supreme Court of the United States.

OCTOBER TERM, 1899.

EX PARTE SMILER.

Petition and Notice to Dismiss, Affirm or Advance Cause.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

EX PARTE SMILER.

Petition and Notice to Dismiss, Affirm or Advance Cause.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

EX PARTE SMILER.

You will please take notice, that the petition annexed hereto, with a copy of which you are herewith served, will be presented to the United States Supreme Court, at Washington, D. C., on the 27th day of April, 1891, at the opening of the session on that day, or as soon thereafter as the said court will entertain the same, and I shall then and there move for the relief prayed for in said petition.

First. That the appeal herein be dimissed; or,

Second. That the order appealed from be affirmed; or,

Third. That the appeal herein be advanced and set down for argument during some day of the present term, as to the court may seem just and proper, or for such other order or relief as to the court may seem proper in the premises.

Dated, ALBANY, *April* 4th, 1891.

Yours etc.,

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel for A. A. Brush, Agent and Warden, and The People of the State of New York,
Albany, N. Y.

To AMBROSE H. PURDY, Esq., *Of Counsel for Appellant.*

SUPREME COURT OF THE UNITED STATES.

EX PARTE SMILER.

To the Supreme Court of the United States:

The petition of Charles F. Tabor respectfully shows: That he is the Attorney-General of the State of New York, and as such is attorney for A. A. Brush, Agent and Warden of the State Prison at Sing Sing, New York, and attorney for the people of the State of New York, in all matters in which said people have any interest, and that he has entered his appearance herein as counsel for the said Brush, appellee.

Your petitioner further shows, upon information and belief, that on the 13th day of June, 1890, Harris A. Smiler, the above-named appellant, was convicted of the crime of murder in the first degree at a Court of General Sessions of the Peace in and for the city and county of New York, and sentenced upon such conviction to death under chapter 489 of the Laws of 1888, committed to the custody of said Brush under said law. That an appeal was taken from said judgment to the Court of Appeals of the State of New York, which appeal was duly submitted to said court, and on the 13th day of January, 1891, said judgment was affirmed, and afterwards said judgment of the Court of Appeals was duly made the judgment of said Court of General Sessions of the Peace. And that thereafter, and previous to the 12th day of March, 1891, the said Harris A. Smiler was again duly arraigned before said Court of General Sessions of the Peace in pursuance of chapter 489 of the Laws of 1888, aforesaid, and particularly in pursuance of section 503 of the Code of Criminal Procedure of the State of New York, as amended by said chapter 489, and section 504 of said Code as amended by said chapter, which court did duly issue its warrant to the said agent and warden commanding the said agent and warden to do execution of the sentence of death during the week appointed therein. And that afterwards, and before the execution of said sentence, the said Harris A. Smiler, by Ambrose H. Purdy, his attorney, made a petition to the judges of the Circuit Court of the United States for the Southern District of New York asking for a writ of *habeas corpus*, requiring the said Augustus A. Brush, as agent and warden, to produce the body of said Harris A. Smiler before said Circuit Court at some time to be designated in said writ, which petition was verified by said Purdy on the 12th day of

March, 1891. And that afterwards, and on the 12th day of March, 1891, the said Circuit Court, by E. Henry Lacombe, a judge thereof, duly made and entered an order that the prayer of the said petitioner be in all things denied, and afterwards and on the same day, an appeal was taken from said order to the Supreme Court of the United States, which appeal was in form allowed by Judge Lacombe. And the citation thereupon issued to the said agent and warden returnable on the 23d day of March, 1891, which citation and appeal were duly served upon said agent and warden.

And your petitioner further alleges that a transcript of the said proceedings had before the said Lacombe was made by the clerk of the said Circuit Court and transmitted to the clerk of the Supreme Court, and that in pursuance thereof said appeal has been duly docketed.

And your petitioner further alleges that the sole ground stated in said petition for a writ of *habeas corpus* was the alleged fact that after the trial and conviction, as aforesaid, of the said Smiler, the counsel who appeared for him upon the said trial abandoned the case, and thereafter one John R. Heinselman was, by the Court of the General Sessions of the Peace, duly recognized by the said court, the said court having authority so to do; and the said Heinselman appeared for the said Smiler and appealed from said judgment to the Court of Appeals, as aforesaid, and argued the said appeal before the said court, and had the exclusive care and management of the case from the date of the said conviction until the affirmance of the judgment by the Court of Appeals. It being further alleged in said petition that the said John R. Heinselman was not an attorney or counselor-at-law entitled to practice in the courts of this State or any other state, and that, therefore, the said Smiler was deprived of the right and privilege of counsel as guaranteed by the Constitution; and that, therefore, as the said petitioner alleges, the judgment and sentence in this case was void under the Constitution.

Your petitioner herein now alleges, upon information and belief, that there is no merit in said appeal, and that the said application for writ of *habeas corpus* shows no ground for the granting of the same, and no facts are stated in said petition showing that the said Smiler was restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.

And your petitioner further alleges, upon information and belief, that substantially the same question is involved in other appeals now pending in this court undetermined and soon to be argued.

Wherefore, in consideration of the importance of having the laws of the State of New York duly administered and carried into effect, your petitioner prays that upon an inspection of the record herein —

First. That the appeal herein be dismissed; or

Second. That the order appealed from be affirmed; or

Third. That this appeal be advanced and set down for argument during some day of the present term as to this court shall seem meet and proper.

Dated *April* 3, 1891.

CHARLES F. TABOR.

STATE OF NEW YORK,
CITY AND COUNTY OF ALBANY, } *ss.:*

Charles F. Tabor, being duly sworn, says: I am the petitioner named in the foregoing petition; I have read said petition and know the contents thereof; and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CHARLES F. TABOR.

Sworn to before me,
April 3, 1891.

WALTER L. CHILDS,
Notary Public, Albany Co., N. Y.

STATE OF NEW YORK,
CITY AND COUNTY ALBANY, } ss. . .
Clerk's Office,

I, Ansel C. Requa, clerk of the said city and county, and also clerk of the Supreme and County Courts, being courts of record held therein, do hereby certify that Walter L. Childs, whose name is subscribed to the jurat of the annexed affidavit, was, on the day of the date thereof, a notary public, in and for the county of Albany, dwelling in said county, duly authorized to administer oaths for general purposes; and that I am well acquainted with the handwriting of the said notary public, and verily believe that the signature to the said jurat is genuine.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed my official seal this 3d day of April, 1891.

A. C. REQUA,
Clerk.

MAY 23 1891
JAMES H. McKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1672.

IN THE MATTER OF THE APPEAL OF HARRIS A. SMILER.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1672.

IN THE MATTER OF THE APPEAL

OF

HARRIS A. SMILER.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,

Attorney-General of New York,

Of Counsel, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1672.

IN THE MATTER OF THE APPEAL

OF

HARRIS A. SMILER.

This is an appeal by Harris A. Smiler from an order of the Circuit Court of the United States for the Southern District of New York held in the city of New York on the 12th day of March, 1891, denying the petition of the said Smiler for a writ of habeas corpus to inquire into the cause of his detention at Sing Sing prison by Augustus A. Brush, Agent and Warden of said prison.

BRIEF FOR AGENT AND WARDEN.

STATEMENT OF FACTS.

The petitioner, Harris A. Smiler, by Ambrose H. Purdy, his attorney, on the 12th day of March, 1891, presented to the Circuit Court of the United States for the Southern District of New York a petition, signed and verified on that day by the said Purdy, praying for a writ of *habeas corpus* to be issued to Augustus A. Brush, Agent and Warden of Sing Sing Prison, upon the general ground that the petitioner was said to be "*unlawfully imprisoned and restrained of his liberty contrary to law and in violation of the Constitution of the United States by Augustus A. Brush as Agent and Warden of the State prison at Sing Sing.*"

The petition further alleges:

"II. The facts concerning the detention and the claim or authority by virtue of which he is so detained are as follows: He

was convicted of the crime of murder in the first degree in the Court of General Sessions of the Peace in and for the city and county of New York, on the 18th day of June, 1890, and sentenced, upon such conviction, to death, under chapter 489 of the Laws of 1888, and committed to the custody of said Brush accordingly.

"III. That after the trial and conviction as aforesaid, the counsel who appeared for the said Smiler abandoned the case, and thereafter, one John R. Heinzelman was, by the Court of the General Sessions of the Peace, held in and for the city and county of New York, Justice James Fitzgerald presiding, the said court then and there having authority to do so, recognized the said John R. Heinzelman, appeared for the defendant Smiler and appealed from said judgment, conviction and sentence of the Court of General Sessions of the Peace in said action to the Court of Appeals of this State, and argued said appeal before said court, and had the exclusive care and management of the case from the date of conviction until the affirmance of the judgment by the Court of Appeals.

"That the said John R. Heinzelman was not an attorney or counselor-at-law entitled to practice in the courts of this State or any other State, and was, therefore, incompetent and incapable of managing such case and protecting the rights of said defendant Smiler. That said Smiler was deprived of the right and privilege of counsel as guaranteed by the Constitution. Your petitioner says that the judgment and sentence in this case is void under the Constitution."

"Your petitioner alleges that the commitment aforesaid and the detention under the conviction and sentence aforesaid and under said indictment are null and void, and of no force or validity."

In the affidavit of verification it is stated by Mr. Purdy that he was authorized by the petitioner to make, sign and verify the petition, and that the reason that the same is not verified by the petitioner himself is "that he is in close and solitary confinement at said Sing Sing prison, and that the week fixed for his execution begins on Monday next, March sixteenth, and there is not time, therefore, to have him verify and serve the writ without endangering his life."

The Circuit Court, on the 12th of March, 1891, on reading and filing said petition, and after hearing counsel for the said petitioner, "ordered that the prayer of said petitioner be and the same hereby is in all things denied."

On the same day an appeal was taken from said order to the Supreme Court of the United States. And on the same day a citation issued returnable on the 23d day of March, 1891. On the 27th day of April, 1891, a motion was made by the Attorney-General in behalf of the agent and Warden, to have the appeal herein dismissed, or the order affirmed, or that the appeal be advanced and set down for argument at some day in the present term. This court made an order setting the case down for May 11, 1891.

POINTS.

I.

The petition was not signed by the petitioner or verified by him, and, therefore, no proof was adduced before the Circuit Court sufficient to confer upon it jurisdiction to issue the writ. Section 754, Revised Statutes, expressly provides that the application for the writ shall be "*by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority if known. The facts set forth in the complaint should be verified by the oath of the person making the application.*"

II.

Section 753 of the Revised Statutes provides "the writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof; *or is in custody in violation of the Constitution or of a law or treaty of the United States.*" * * *

By sections 763 and 764 of the Revised Statutes it is provided that an appeal may be taken from the final decision of the Circuit Court to the Supreme Court "*in the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.*"

The petition herein does not show that the petitioner is in custody or restrained of his liberty in violation of the Federal Constitution, or of any law or treaty of the United States. (Ex parte Dorr, 3 How., 103; In re Burrus, 136 U. S., 591.) In this last case Mr. Justice Miller, writing the opinion of the court, said: "It is not now the law, and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of *habeas corpus*. In order to obtain the benefit of this writ, and to procure its being issued by the court or justice or judge who has a right to order its issue, it

should be made to appear upon the application of the writ *that it is founded upon some matter which, justifies the exercise of Federal authority, and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States.*"

It is perfectly clear that the general allegation in the petition, that the petitioner is "*unlawfully imprisoned and restrained of his liberty contrary to law and in violation of the Constitution of the United States,*" is not sufficient as an allegation or statement of fact concerning the detention of the petitioner in jail, to show that he comes within the exception of section 753 of the Revised Statutes cited. In construing section 641 of the Revised Statutes, which declares that "when any civil or criminal prosecution is commenced in any State court for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in any part of the State where such suit or prosecution is pending, any rights secured to him by any law providing for the equal rights of citizens of the United States * * * such suit or prosecution may * * * be removed for trial into the next Circuit Court to be held in the district where it is pending." This court said: "*So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions could be retained in a State court for insufficient allegations when the accused imagined he would gain by the removal.*" (See Virginia v. Rives, 100 U. S., 332.)

And so "*The general averment, in the petition, that he was detained in violation of the Constitution and laws of the United States, and that the District Court had no jurisdiction or authority to try and sentence him, in the manner and form above stated, is an averment of a conclusion of law, and not of facts, that would, if found to exist, displace the presumption the law makes in support of the judgment.*" (In re Cuddy, Petitioner, 131 U. S., 280, 286.)

The remaining allegations of the petition are equally insufficient to show that the petitioner is restrained of his liberty for any violation by the State authorities of the Federal Constitution or of the laws and treaties of the United States.

III.

The only provision of the Federal Constitution which bears upon the question of the right of a defendant to have the assistance of counsel is that contained in article 6 of the amendments to the Constitution, and is as follows: "*In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, * * * and to have the assistance of counsel for his defense.*" But it is well settled that this amendment was not intended to limit the power of the State government, and had operation only upon the national government. (See Spies v. Illinois, 123 U. S., 166; In re Kemmler, 136 U. S., 436.)

It is also to be noticed in this connection that while the Constitution cited undoubtedly secures to the defendant in the Federal courts the right "*to have the assistance of counsel for his defense,*" there is nothing compulsory upon the courts to assign counsel. The same provision, in substance, is contained in the Constitution of the State of New York. See section 6 of article 1, which provides "*and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions.*" It was never claimed that this provision of the Constitution *compelled* the assignment of counsel. And it was not until the enactment of section 308 of the Code of Criminal Procedure that the State of New York made it obligatory that the court should assign counsel. This section reads as follows: "*If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel.*" It will be noticed in this case also that it is not alleged in the petition that Smiler did not appear with counsel upon his arraignment, but, upon the contrary, it was after the trial and conviction that Heinzelman appeared for the accused Smiler, and the *only allegation* in that behalf is that the court "*recognized the said John R. Heinzelman.*" It would be quite startling if it should be held that this was a violation of the Federal laws. In conclusion upon this branch of the case, it may be said that neither the Federal Constitution nor the Federal statutes nor the Constitution of the State of New York requires the assignment of counsel, and it is only in the case where, on the arraignment of a defendant on a criminal prosecution, the court is

required to assign counsel and that only in a case where he appears without counsel and requests the assignment of counsel. (See People v. Supvs. of Albany Co., 28 How. Pr., 22; approved in principle by Ct. of Appeals. See Peo. v. Supvs of Niagara Co., 78 N. Y., 622.)

IV.

There is no allegation in the petition that the petitioner in any manner or form ever objected, in court or out of court, to the appearance of Heinzelman in his behalf, or has ever attempted in any way to raise that question in the State courts, either by motion for a new trial, arrest of judgment or appeal.

It is not apparent how the petitioner can now raise this question in this court in a collateral way by attempting to turn the writ of *habeas corpus* into a writ of error. If the court before whom this prisoner was tried "*had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further.*" (Ex parte Yarbrough, 110 U. S., 653; and see In re Coy, 127 id., 759; Stephens v. Fuller, 136 id., 447.)

V.

By section 504 of the Code of Criminal Procedure, "upon the defendant being brought before the court *it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant*," *etc.* If the objection now made by the petitioner was valid in law, it was the duty of the court, by the above section, to have sustained it. And refusing so to do, the defendant could have appealed to the highest court of the State, and if any Federal question was involved, ultimately he could have appealed to this court. (Bush v. Kentucky, 107 U. S., 119.)

VI.

If it could be in any way held that the privilege or right of the assignment of counsel was secured by a constitutional provision, Federal or State, then it is claimed that the petitioner has waived his privilege.

The rule is well settled that "one may waive constitutional provisions intended for his benefit." And the highest court in the State of New York has sustained that proposition in the case of Pierson, Plaintiff in Error, v. The People, Defendants in Error (79 N. Y., 424). In this case Pierson was indicted for murder and upon the trial challenged the array of jurors, but afterwards, the court having sustained the challenge withdrew it and the trial proceeded and the prisoner was convicted of murder. The court held on appeal that the prisoner could withdraw his challenge and that he thereby waived any objection which existed in law. In this case, Earl, Justice, delivering the opinion, distinguished the case of Cancemi v. The People (18 N. Y., 128), and said: "*That case is no authority for the contention of the prisoner's counsel in this case. Here there was due process of law. The prisoner was tried by a common-law jury of twelve.* * * * *If, therefore, there was any irregularity which would be ground of error it was merely formal, affecting no public interest, trenching upon no public policy; and to hold that it could not be waived would be without precedent and against reason.*" The basis of the decision in the Cancemi case was, that the prisoner could not stipulate that a trial proceed with eleven jurors for the reasons "that the parties could not, by consent, alter the substantial constitution of the court, and that the State has an interest in the preservation of the liberties and lives of its citizens and will not allow them to be taken away without due process of law, even by the consent of those accused of crime." The pith of the decision in the Cancemi case is contained in the following sentence contained in the opinion by Strong, Justice: "*The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the powers of the parties.*" It is quite apparent, therefore, that the doctrine enunciated in the Cancemi case cannot prevent the application of the principle now invoked by the appellee here.

VII.

It is transparent and obvious that this proceeding upon the part of the petitioner, attempting to review the judgment of conviction of the petitioner of the crime of murder, affirmed by the highest court of the State, upon questions never raised or submitted to the

State courts, was initiated by counsel simply to gain time and to interfere with the orderly administration of the law.

Therefore the appeal should be dismissed or the order affirmed, and a direction made that the mandate of this court be at once sent down to the Circuit Court.

CHARLES F. TABOR,
Attorney-General of the State of New York,
Attorney for the Warden and the State.

140
141-1

FILED
OCT 31 1890
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

October Term, 1890. No. 1471.

TEXAS LAND AND CATTLE COMPANY, LIMITED,

Plaintiff in Error,

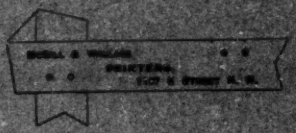
vs.

J. W. SCOTT, Defendant in Error.

To the Circuit Court of the United States for Western District of Texas.

Motion to Dismiss or Affirm and Brief.

A. W. HOUSTON,
For J. W. Scott, Defendant.



IN THE

Supreme Court of the United States.

TEXAS LAND AND CATTLE COMPANY, LIMITED, Plaintiff in Error.

vs.

J. W. SCOTT, Defendant in Error.

No. 1,471.

Writ of Error to Circuit Court of the United States for Western District of Texas, Sitting at San Antonio.

Now comes J. W. Scott, defendant in error, and shows to the Honorable Supreme Court of the United States that this case is not reviewable in this Court for the reason that there was no final judgment rendered in the Circuit Court; that the writ of error herein is prosecuted upon a decree of the Circuit Court remanding this case to the State Court from which it was improperly removed, the Circuit Court having no jurisdiction to try the same.

Wherefore, defendant asks that the writ of error herein be dismissed for want of jurisdiction, or that the judgment of Circuit Court be affirmed.

Respectfully submitted,

A. W. HOUSTON,

Of Counsel for J. W. Scott, Defendant in Error.

BRIEF SUBMITTED WITH FOREGOING MOTION TO DISMISS.

The following is the order made by Circuit Court from which the writ of error herein is prosecuted, viz.:

"J. W. SCOTT

vs. No. 393.

THE TEXAS LAND AND CATTLE COMPANY, LIMITED.

"This cause this day coming on to be heard upon the motion of the plaintiff, J. W. Scott, to remand this cause for trial to the District Court of Nueces County, Texas, and the Court having heard the pleadings, agreement of parties as to facts, and argument herein, is of the opinion that the law is with the plaintiff on his said motion, and that this Court has no jurisdiction of this cause, and that it was removed without right from said District Court of Nueces County, Texas. Wherefore, it is ordered and decreed by the Court that this cause be remanded for trial to the District Court of Nueces County, Texas, and that the defendant, the Texas Land and Cattle Company, pay the costs of this Court. To which finding and order the defendant in open court excepts."

Orig. Rec., p. 22.

The attorney for plaintiff in error has entered into the following agreement in this cause, viz.:

"THE TEXAS LAND & CATTLE COMPANY, LIMITED,
Plaintiff in Error,

vs.

J. W. SCOTT, Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

"For the purposes of motion to dismiss it is hereby agreed that the writ of error herein was taken from an order of the Circuit Court of the United States for the

Western District of Texas, sitting at San Antonio, remanding the cause to the State Court from whence it came. Printing of record, or any portion thereof, for the purposes of motion to dismiss is hereby waived. I further agree that motion to dismiss may be submitted at once upon brief of defendant in error, as I do not desire to brief same.

"CHAS. W. OGDEN,
"*For Plaintiff in Error.*

"October 23, 1890."

Considering which, it is respectfully submitted that this Court has no jurisdiction of this cause and it should be dismissed.

R. & D. R. Co. *v.* Thouron *et al.*, 134 U. S., 45–6.
R. & W. P. T. Ry. & W. Co. *v.* same, 134 U. S., 45–6.
Lawyers' Ed. 33, p. 871.

A. W. HOUSTON,
For J. W. Scott, Defendant in Error.